

ARLEN SPECTER, PENNSYLVANIA, CHAIRMAN

ORRIN G. HATCH, UTAH  
CHARLES E. GRASSLEY, IOWA  
JON KYL, ARIZONA  
MIKE DEWINE, OHIO  
JEFF SESSIONS, ALABAMA  
LINDSEY O. GRAHAM, SOUTH CAROLINA  
JOHN CORNYN, TEXAS  
SAM BROWNBACK, KANSAS  
TOM COBURN, OKLAHOMA

PATRICK J. LEAHY, VERMONT  
EDWARD M. KENNEDY, MASSACHUSETTS  
JOSEPH R. BIDEN, JR., DELAWARE  
HERBERT KOHL, WISCONSIN  
DIANNE FEINSTEIN, CALIFORNIA  
RUSSELL D. FEINGOLD, WISCONSIN  
CHARLES E. SCHUMER, NEW YORK  
RICHARD J. DURBIN, ILLINOIS

MICHAEL O'NEILL, *Chief Counsel and Staff Director*  
BRUCE A. COHEN, *Democratic Chief Counsel and Staff Director*

## United States Senate

COMMITTEE ON THE JUDICIARY  
WASHINGTON, DC 20510-6275

September 28, 2006

The Honorable Thomas Barnett  
Assistant Attorney General  
Antitrust Division  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

The Honorable Kevin J. Martin  
Chairman  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Dear Assistant Attorney General Barnett and Chairman Martin:

We write to you concerning AT&T's proposed acquisition of BellSouth. The Antitrust Subcommittee has reviewed this transaction extensively over the last several months, including conducting a hearing in June examining the likely competitive consequences of the deal. As you know, this proposed merger would combine two of the four remaining regional bell operating companies ("RBOCs") created after the break-up of the original AT&T phone monopoly more than 20 years ago. At least for the foreseeable future, the combined AT&T/BellSouth will be the local phone company for virtually all consumers in 22 states throughout the Far West, the Midwest and Southeast. It will also bring Cingular Wireless, the nation's largest wireless phone company, under common ownership.

For a variety of reasons, we believe that this merger raises very important competition and communications policy issues and should be examined carefully by both of your agencies. While we recognize that new technologies and new modes of communications have brought additional choices for consumers in recent years, we nonetheless recommend that your agencies consider adopting conditions to approval of the merger if they are necessary to help ensure that the telecommunications market remains open to new sources of competition.

The issue most deserving of close scrutiny is the merger's potential effect on the availability of wireless spectrum to be used for broadband service. Many industry analysts believe that the most promising option for intermodal competition with the established phone and cable companies will be provided by the broadband wireless technologies that employ the standards known as "WiMAX." However, WiMAX will not be able to develop into a truly effective competitive alternative without sufficient

wireless spectrum for competitors to utilize. After the merger, the combined AT&T/BellSouth will have significant holdings of wireless spectrum in the 2.3 GHz and 2.5 GHz bands, including holdings in several important geographic markets, including Atlanta, New Orleans, and other key southeastern markets. Some argue that the combined company will have little incentive to allocate that spectrum to WiMAX services because development of WiMAX will likely cannibalize their current customer base. For that reason, opponents of this proposed merger argue that if the AT&T/BellSouth deal is completed the new entity will attempt to keep the spectrum out of productive use, instead opting to "warehouse" the necessary spectrum to keep it away from competitors. The merging parties deny this allegation. They contend that there exists ample spectrum available for competitors to develop WiMAX services, and that this merger does nothing to change the availability of such spectrum.

Nonetheless, our concern is that the deployment of WiMAX is not artificially limited, and that it continues to have the potential to be a crucial competitive alternative in the future. Therefore, we urge your agencies to carefully examine the market for spectrum, which types of spectrum may be necessary to efficiently and economically provide WiMAX service, the impact of this merger on that spectrum market, and any allegations of warehousing, and to take whatever steps are appropriate to assure that competitive WiMAX services have the opportunity to develop freely in the marketplace, including divestiture of spectrum if such divestiture is found necessary.

We also believe that your agencies should closely examine local loop facilities in the BellSouth territory, to determine whether there are any situations where both AT&T and BellSouth are current or potential providers of service to business customers. In such situations, the merger of the two might diminish competition, and the agencies should evaluate whether some remedy, including possible divestitures of these facilities, may be necessary to alleviate potential anticompetitive impacts in local markets.

More broadly, the significant expansion in size and scope heralded by this merger makes it important for your agencies to be mindful of the general competition policy concern of maintaining a market open enough to ensure that new and already existing types of telecom services have a fair opportunity to compete with the resulting company. The marketplace, and consumers, will be best served if the combined company is not able to utilize any market power created by this merger to block or slow the development of new technologies, to create anti-competitive bottlenecks, or to unreasonably prevent competitive telecommunications providers from being able to interconnect with their networks on reasonable economic terms. Without recommending any particular actions in this regard, we nonetheless believe it would be useful in the course of your evaluation of this merger to be cognizant of the conditions applied to AT&T's prior merger with SBC, and consider whether any of the considerations that led to those conditions, or any of the considerations that led our Subcommittee (in our letter of July 29, 2005) to recommend other conditions, are relevant in this instance.

As you both know, robust and vigorous competition in the telecommunications market is essential to consumers and to our national economy. The two decades

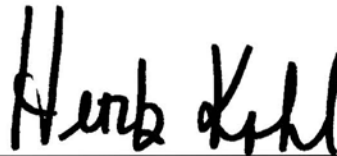
following the break-up of the Bell telephone monopoly produced an explosion of new technologies and new choices for consumers—choices which substantially reduced the costs of telecommunications services and improved the efficiency and quality of these services throughout the economy. We believe that consideration of the various factors discussed above will help ensure that the benefits of a competitive marketplace will not be lost amidst the on-going consolidation in this industry.

Thank you for your attention to this matter.



---

MIKE DeWINE  
Chairman  
Subcommittee on Antitrust  
Competition Policy & Consumer Rights



---

HERB KOHL  
Ranking Member  
Subcommittee on Antitrust  
Competition Policy & Consumer Rights